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No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORLON R. HILL,

Petitioner

vs.

UNITED STATES ARMY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT AND THE
MERIT SYSTEMS PROTECTION BOARD

PETITION FOR WRIT OF CERTIORARI

Orlon R. Hill
108 W. Briarwood Lane
Harker Heights, TX 76543
Home Ph., 817-699-2659
Work Ph., 817-287-3956

QUESTIONS PRESENTED

Was Petitioner denied the ability to meet his burden of proof in the first whistleblowing defense case because: (1) the MSPB Judge erred by not first reading the Petitioner's Hearing Exhibit "A" (listing several major and specific whistleblowing instances, senior officials, and reprisals received by Petitioner) and then she denied all whistleblowing witness both prior to the Merit Systems Protection Board hearing; (2) then disallowed questioning of all other called witnesses during the hearing about reprisals against Petitioner; (3) then confesses at the end of the hearing that she had not even read Petitioner's Hearing Exhibit; (4) then the Judge making an erroneous initial decision against Petitioner?

Should Petitioner's Individual Right of Action Appeal then be denied by the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit on basis of *res Judicata?*

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SUPREME COURT OF THE UNITED STATES

October Term, 1993

Orlon R. Hill, Petitioner	)
vs.	)
United States Army, Respondent	)

PETITION FOR WRIT OF CERTIORARI
.UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner, Orlon R. Hill, respectively prays that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit to reverse that decision affirming Merit Systems Protection Board's dismissal of MSPB DOCKET NO DA-1221-92-0394-W-1, Individual Right of Action Appeal, (which started with previous MSPB DOCKET DA7529110549 that consisted of concurrent multiple and interrelated affirmative defenses) on the basis of res Judicata. Petitioner was wrongfully demoted because of his whistleblowing and has been

denied by the courts of his right to present this affirmative defense. This is the last chance for Justice to prevail. In the first action, the Administrative Judge denied Petitioner from interviewing whistleblowing witnesses and reasonably presenting his case.

OPINIONS BELOW

The opinion of the Court of Appeals dated 19 Apr 1993 appears at pages 1-9 of attached Appendix A.

The initial MSPB decision dated 30 Jun 1992 is at pages 1-16 of attached Appendix B.

The final MSPB decision dated 5 Nov 92 is at pages 17-19 of attached Appendix B.

JURISDICTION

The Court of Appeals Opinion in this matter was filed April 19, 1993. This Courts jurisdiction is invoked under Title 28, U.S.C. section 1254(1).

STATEMENT OF THE CASE

In Sep-Oct 1989, the Army Deciding Official (and Petitioner's 3 level supervisor)

was informed by the Fort Hood Civilian Personnel Officer that sexual harassment by a male branch chief was ongoing in Petitioner's Division. This information originated from the Civilian Personnel Officer's wife that worked in the Division until June 1990.

The Deciding Official, Civilian Personnel Officer, and Petitioner's supervisors took no action to stop the harassment or inform the Petitioner of it. In early Feb 1990, Petitioner was called names and severely criticized by COL Baucum in a note to Petitioner's 2nd level supervisor who was also a long term friend of COL Baucum. This criticism related to Petitioner's assigned mission and duties relating to the Commercial Activities (CA) Program, an official US Army mission.

By early May 1990, the Petitioner was suffering from major clinical depression caused by work pressures and advised his supervisors and employees that he was in a Doctor's care.

Employees advised Petitioner's supervisors that Petitioner was treating them differently however supervisors took no action to assist Petitioner.

Also in early May, the Petitioner was advised (for the first time) by his 1st level supervisor that the branch chief was harassing one female employee in the Division and others elsewhere within the Directorate. Petitioner immediately recommended that the branch chief be removed at once from the Division work area which was denied by his 1st, 2nd, and 3rd level supervisors.

At the same time in early May 1990, Petitioner was directed by his 1st and 2nd level supervisors not to speak to employees about the ongoing sexual harassment or take any action to stop it. An AR 15-6 Investigation conducted by an outside person had been ordered under and by authority of Petitioner's 3rd level supervisor that also was the Deciding Official. Petitioner was directed by his

supervisors not to discuss anything about the sexual harassment or interfere with the "Official Investigation" or he would suffer severe adverse action.

In early Aug 1990, Petitioner was informed (for the first time) by an EEO Counselor that 2 EEO complaints involving sexual harassment of several females was also being investigated in Petitioner's Division of 14 personnel simultaneously with the AR 15-6 investigation.

In early Sep 1990, Petitioner presented a letter to his 1st and 2nd level supervisors from his Doctor strongly urging 4 weeks of psychotherapy for the Petitioner.

In mid Sep 1990, the AR 15-6 Investigation was completed after 4 months duration and the guilty branch chief was only then relocated from the Division work area to another job. A report copy furnished to the Petitioner 9 months later indicated Petitioner was not negatively implicated in any way.

Petitioner attended 4 weeks of

psychotherapy during Oct 1990.

Upon returning to work in late Oct 1990; Petitioner was relieved from his position as Division Chief and relocated to a small office cubical located within a busy hallway. Petitioner was punished although no investigations about him had been conducted.

In mid Nov 1990, the first USACARA investigation of sexual harassment complaints by 3 female employees of Petitioner was conducted with Petitioner being a designated Responding Official.

In mid Dec 1990, the second USACARA EEO investigation concerning a fourth female employee was conducted with Petitioner as Responding Official.

During the Christmas Season 1990, Petitioner accidently witnessed COL Baucum in an early morning rendezvous with a female employee.
Petitioner reported this incident to the Fort Hood Inspector General in mid Feb 1991 because

announcement had been made that COL Baucum would replace his current 3rd level supervisor (COL Glosson) in Jun 1990.
Based on earlier reprisals by COL Baucum, Petitioner feared further reprisals from him.

In early and mid Feb 1991, two USACARA final reports were issued implicating reprisals by several unnamed managers within the Directorate. The female employees had previously charged 4 managers in their EEO complaints. These 4 named managers were the Petitioner's 1st & 2nd level supervisors, the Petitioner, and 1 of Petitioner's subordinate supervisors.

Petitioner was served a letter in mid Mar 1991 by his 2nd level supervisor (COL Templer) as Recommending Official. The letter recommended the Petitioner be permanently removed from his Division Chief position and downgraded from GM13 to GS11. The principle justification was that the Petitioner had created a hostile and threatening environment;

and had not taken action to protect the harassed females. This letter was presented approximately 6 weeks after Petitioner filed a whistleblowing IG complaint against COL Baucum for the early morning rendezvous.

A response to the recommended downgrade was submitted by the Petitioner to the Deciding Official who was also his 3rd level supervisor in early Apr 1991. The Petitioner documented and claimed; (1) he was rendered powerless by his supervisors from taking action to resolve the hostile environment and protect the victims, (2) his 1st, 2nd, and 3rd level supervisors had assumed control of the work area therefore creating the hostile environment themselves) by delaying completion of AR 15-6 Investigation and requiring the harasser to remain with the victims in work area for 4 months, (3) he was working at diminished capacity because of major clinical depression and inherited polyneuropathies in throat and muscles.

The Deciding Official sustained in early May 1990 the recommendation to downgrade and otherwise punish the Petitioner stating: (1) There was no record or knowledge of Petitioner's handicap (2) Petitioner was attempting to blame others for not protecting the sexual harassment victims.

On 10 Jun 92, Petitioner made his initial appeal (first action) to the Dallas Regional MSPB citing whistleblowing, handicap, unauthorized personnel practices, and harmful error as affirmative defenses.

On 19 Jul 91, Petitioner submitted his first amendment to the 10 Jun 91 appeal elaborating on Petitioner's long term whistleblowing and resulting reprisals.

On 15 Sep 1991, Petitioner's submitted his Hearing Exhibit "A" to the MSPB citing minute whistleblowing details and reprisals received with names of senior officials, places, dates, evidence, and applicable US statutory codes. Also a separate letter listing names and

justification for all required whistleblowing defense witnesses was forwarded to MSPB on 15 Sep 1991.

Before hearing began on 25 Sep 1991, the AJ issued her memorandum of conference and rulings which surprisingly disapproved all requested whistleblowing witnesses. Off record, the AJ stated the hearing about whistleblowing would take too long.

During the hearing on 25 and 27 Sep 1991, the AJ appeared hostile and repeatedly ordered Petitioner's representative not to question any witness about whistleblowing instances and reprisals. She permitted whistleblowing questions only to the Deciding Official. Other witnesses having first hand knowledge that were questioned were directed by her not to respond.

In the closing minutes of the last day of hearing on 27 Sep 1991, the AJ confessed on the record that up until that time, she had not read Petitioner's Hearing Exhibit "A" submitted to her on 15 Sep 1991.

Then Petitioner realized the Judge's massive error for the first time and understood why she had been hostile and disapproved all defense whistleblowing witnesses. There was no way for Petitioner to compensate for her massive error at the hearing close.

After the MSPB initial decision on 10 Oct 1991, and although still recovering from major clinical depression, the Petitioner appealed to the Board pro se in early Nov 1991 because his representative had been seriously ill for months.

Petitioner had furnished copies of the total file of appeals to the Office of Special Counsel (OSC). The Petitioner received two letters dated 15 Jan 1992 completing their investigation and recommending that a Right of Action Appeal (second action) be submitted to MSPB.

The MSPB final decision dated 24 Jan 1992 was issued denying Petitioner's appeal without first considering two Office of Special Counsel

letters, (both dated 15 Jan 1992) about Petitioners case.

The Right of Action Appeal (second action) was submitted to Washington MSPB in good faith per the OSC recommendation by the Petitioner on 6 Mar 1992. By then, the Petitioner's medical condition had improved and most AJ errors in the first action were realized by him and were enumerated to the Board.

As requested by Fort Hood, the Dallas Regional MSPB on 18 May 1992 issued a show cause order to not dismiss the second action res Judicata because MSPB had addressed the whistleblowing and a decision had previously been made in first action.

Petitioner's 22 May 1992 response to the MSPB show cause order elaborately detailed most of the AJ's massive errors thus detailing that the Petitioner had been denied the opportunity to question whistleblowing witnesses in the first action.

The initial MSPB decision to dismiss the

second action due to res Judicata was issued on 30 Jun 1992.

Petitioner appealed the dismissal of the second action on basis of res Judicata to the MSPB Board on 30 July 1992 and the full Board affirmed the dismissal on 5 Nov 1992.

Petitioner's appeal was docketed in late Nov 1992 and his informal brief was forwarded to the Appeals Court on 7 Dec 1992.

The Appeals Court affirmed the dismissal of the second action on 19 Apr 1993 stating;

> "However, the decision in the first case is not an issue here."

The Appeals Court then repeated erroneous conclusions from the AJ in the first action.

REASONS FOR GRANTING THE WRIT

The appeals court decision has disputed the accepted and usual course of judicial procedures thereby sanctioning such a departure by the Merit Systems Protection Board as to call for the power of supervision by the Supreme Court of the United States. The

Petitioner has been previously denied and should be afforded the opportunity to reasonably present his whistleblowing case in court.

In MSPB DOCKET DA7529110549, COL Baucum (Director of G3/DPTM over Range Division) and a subordinate colonel wrote derogatory notes at Appendix A, pages 10&13, to COL Templer on 2 Feb 90 about Petitioner's "half-assed, his henchmen, overzealous, misinformation, poking nose, which we've had to stiff arm him before" due to Petitioner's performance of the Commercial Activities (CA) Program Management Mission. Since COL Templer (Petitioner's recommending official and 2nd line supervisor) and his designated new Commander (COL Baucum) were associates since college, these false and derogatory notes about Petitioner performing his official CA Program Management duties prejudiced Petitioner's Recommending Official, COL Templer, who later on 22 Mar 91 singled out Petitioner for demotion on unrelated charges

which seemingly were not related to Petitioner's performance of the CA Program Management Mission. Whistleblowers such as the Petitioner have experienced and easily recognized his supervisors use of the Guide to Retaliation by Roy C. Bartholomae published in July 91 at pages 14-15 Appendix A. The outline often used by supervisors for retaliation is:

> "Be very patient. Allow time (years if necessary) between the whistleblowing incident and the beginning of retaliation, so that it is almost impossible to link the two."
> "Wait for, or create windows of opportunity for retaliation."
> "Never attack on a front where the whistleblower has an acceptable or proven track record."
> "Regular inoculations against scruples are also very helpful."

Petitioner was informed by supervisors in 1 May 90 that a subordinate branch chief (John Hamlin) was sexually harassing female division employees. COL Glosson confessed he had previously known about Hamlin's sexual harassment since Sep-Oct 89, Appendix A, pages 16-19 by stating:

"He (the Civilian Personnel Officer, Mr. Jim Hiltz) would.... we had periodic update ".
"I think he told me one time, just mentioned that, you know, "she's hearing this."
"October, November of.... '89."

Prior to 1 May 90, COL Glosson had not previously informed Petitioner and did not himself take any immediate action to protect the victims. Having knowledge of the harassment; COL Glosson as the Garrison Commander, was required to take immediate action per 29 CFR chapter XIV, Part 1604, Section 1604.11. COL Glosson himself therefore became he primary responsible authority instead of Petitioner because subparagraph (a)(3) of section 1604.11 states:

"such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

On 1 May 1990, acting as Division Chief, Petitioner strongly and immediately recommended that John Hamlin be removed at once from the work area however COL Templer and COL Glosson

refused, per following quotes in MSPB DOCKET DA7529110549 by Judge Malouf in extract of her initial 10 Oct 91 decision at Appendix A, pages 24-26:

> "In response, the appellant argued that the agency refused to move Hamlin out of the division during the pendency of the AR 15-6 investigation and refused to allow the appellant to talk with his subordinate employees about the situation. The appellant's contentions are supported by the record and by the testimony of COL Thomas Templer, the Director of Resource Management, and by the testimony of Mr. Bikoski."
> "There is nothing in the record to establish that higher management made any effort to alleviate the tensions and problems in AOERD."
> "Given Hamlin's continued presence in the division, it would have been impossible for the appellant to have completely shielded Jackson, Phipps, and Remick from Hamlin"

The decision by petitioner's supervisors leaving Hamlin in the work area for 4 additional months violated female employees rights for immediate protection per 29 CFR Chapter XIV Section 1604.11.

Subparagraph (d) of this reference states:

> "With respect to conduct between fellow employees, an employer is responsible for

> acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took **IMMEDIATE and APPROPRIATE CORRECTIVE ACTION."**

This reference was discussed with Judge Malouf during the MSPB hearing pges 27-28, Appendix A. **In the close work environment; removal of Hamlin from the work area was the only feasible way to provide immediate suitable protection for his victims of sexual harassment.**

Yet Judge Malouf made a major error in her decision extract page 29-31, appendix A by concluding:

> "The Appellant did not cite any law or regulation that required the agency remove Hamlin from the workplace prior conclusion of the AR 15-6 investigation."

Even Judge Malouf agreed that Petitioner had been rendered powerless by his supervisors and could effectively do nothing to resolve the hostile environment.

On 12 Feb 91, Petitioner filed a handwritten whistleblowing complaint at Appendix A, page 32-33, with the Fort Hood

Inspector General because COL Baucum had just been announced as the new Garrison Commander to replace COL Glosson in early Jun 1991. This action would make COL Baucum the 3rd level supervisor of Petitioner. Six weeks before the 12 Feb 91 complaint; COL Baucum was witnessed by Petitioner having an illicit rendezvous with his female employee as described in Hearing Exhibit "A" at Appendix A, page 46-51. Petitioner believed the Fort Hood Commanding General should be informed by the Inspector General because COL Baucum's illicit activity would cause embarrassment to the Army. In her 10 Oct 91 decision extract for MSPB DOCKET DA7529110549 at Appendix A, pages 139-140, Judge Malouf stated:

> "The record establishes that the appellant reasonably believed that such conduct by Colonel B. constituted a violation of the Uniform Code of Military Justice contained in Title 10 of the United States Code. I find that under the instant circumstances, the appellant's disclosure was protected and constituted whistleblowing."

In addition, Petitioner had already received reprisals because of COL Baucum's

notes at Appendix A, pgs 10-13, received a year earlier. Petitioner expected more reprisals from COL Baucum, his new 3 level supervisor, because of previous reprisals and his nasty reputation.

COL Templer did not provide whistleblowing protection to the Petitioner as required by Sec 2 PL102-12(a) which states:

> "(a) FINDINGS.- The Congress finds that-
> (1) Federal Employees who make disclosures described in Section 2302(b)(8) of Title 5, United States Code, serve the public interest by assisting in the determination of fraud, waste, and unnecessary Government expenditures;
> (2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service;"

Six weeks after the Petitioner's Inspector General whistleblowing complaint about COL Baucum, the Recommending Official, COL Templer served Petitioner a letter dated 22 Mar 91 recommending his downgrade from GM13 to GS11 citing USACARA reports (dated 31 Jan 91 and 11 Feb 91) as justification. These same reports also implicated and condemned COL Templer as a

management official also accused by the same female EEO complainants. COL Templer stated:

"No, Sir" and I'm sorry Sir. No Sir" @ Appendix A, pg 83-84, in response to question that did he know that he was 1 of 4 supervisors (including Petitioner) charged for reprisal by the same complainants as against Petitioner) as summarized by USACARA in their report findings summary at Appendix A, page 85-87. The USACARA report quotes:

> "In any event, the DRM is in a severe state of health."
> "Mr. Hamlin's supervisor and other supervisors knew of this conduct at the time it was being carried out and did nothing about it."
> "Although management officials have articulated job-related reasons for their action, their explanations are not believable. Therefore they are pretext masking reprisal and inattention to the needs of those victimized by the acknowledged sexual harassment."

COL Glosson (the Deciding Official) confessed in 25 Sep 91 hearing extract Appendix A, pg 88-89, that he **had known** that COL Templer was 1 of 4 supervisors accused of reprisal by

sexual harassment complaints. COL Glosson stated:

> "Yes. I recall their names being mentioned that way, yes."

YET COL GLOSSON COMMITTED A HARMFUL ERROR AND PROHIBITED PERSONNEL PRACTICE PER 5 U.S.C. 7701(c)(2) A&B. BY ALLOWING HIS SUBORDINATE, COL TEMPLER, TO SERVE AS PETITIONER'S RECOMMENDING OFFICIAL per 5 U.S.C.Sec 2302(b). COL GLOSSON THEN ACTED IMPROPERLY BY SUSTAINING THE DEMOTION. In MSPB DOCKET DA7529110549, Judge Malouf ERRONEOUSLY IGNORED these laws and ALLOWED Petitioner to be singled out for punishment by COL Templer from all others although COL Templer was equally guilty by him having major and conflicting interests in placing blame elsewhere. Judge Malouf did not consider that Petitioner was not protected from reprisals by the Agency as required by 29 CFR 1613.261 and would not allow Petitioner to question COL Templer about whistleblowing and reprisal instances.

COL Glosson, the Deciding Official (and Petitioner's 3 level supervisor) issued his decision on 10 May 91 lying there was no record of Petitioner's handicap. He also testified on page 90-91, Appendix A:

> "He made great mention about the handicap business. And yet in reviewing his official file there was nothing in his official file, maintained by the Civilian Personnel Directorate,".

Yet later in the same hearing COL Glosson confessed in hearings for MSPB DOCKET DA7529110549 Appendix A, page 20-23 that in early 1988, he had ordered Petitioner to button his collar:

> "I did that in more of jocular fashion because until that time I did not understand that Mr. Hill had some sort of a malady and could not grasp and fasten the tie."
> "My CPO quickly cautioned me later, said You know, we don't have a requirement that you have to wear a coat and tie."
> "He mentioned something that.... said; I have trouble with my hands, and can't fashion the knot and do it properly."
> "Well, he did walk a little different than.... if I can use the word....normal person."

On pg 183-184 continued his lies to cover his own violations by stating:

"I saw no visible evidence that he made any attempt to clean up the work environment. There was just nothing there. In fact, the environment had to be cleaned up by me as a results of the USACARA investigation, to get all the remedies and to get the positions worked out to reassign the people outside of the DRM office."

Judge Malouf mistakenly believed his lies by concluding in her initial decision at pages 185-186, Appendix A that:

"Glosson stated that a serious negative factor was the appellant's attempts to deflect the responsibility for what happened to someone else."

Petitioner's initial appeal for MSPB DOCKET DA7529110549 was sent to the Dallas Regional MSPB 19 Jul 1991. Appendix A, page 92-93, is extract of BLOCK 27 from the initial appeal whereas whistleblowing was cited as affirmative defense. This extract stated:

"Yes, in a very real sense it should be alleged that there was a whistleblowing factor involved in this action against Mr. Hill. He already had a strong reputation as a whistleblower in several other very sensitive matters, and his supervisors were particularly aware of this propensity in Mr. Hill, so that it was their decision to isolate him from, the beginning in

early 1990 and to prevent his participation in any of the EEO complaint informal complaint resolutions (sexual harassment matters) or in any proper function as the division chief when the problems were first being identified, or at anytime afterward while Mr. Hamlin was forced on Mr. Hill on continued assignment in the same division for another 7-10 months after the supervisors became aware of the problem. It was the protective conduct of Mr. Hill's supervisors toward the sexual harasser which was the likely subject for Mr. Hill to focus on and communicate them as whistleblowing, and it was this which his superiors determined to prevent by isolating him and setting him up as a scapegoat for their own misconduct as his supervising managers."

List of whistleblowing and other witnesses, dated 15 Sep 91, requested by Petitioner to Judge Malouf is at Appendix A, pages 94-101. This list enumerated to Judge Malouf reasons each witness was needed.

Petitioner's Hearing Exhibit "A" (Appendix A, pages34-82) for MSPB DOCKET DA7529110549 was forwarded to Judge Malouf on 15 Sep 91 providing detailed long-term and continuous whistleblowing by Petitioner and resulting reprisals by senior officials against him. Applicable laws and regulations (pg 36-38,

Appendix A) provided to Judge Malouf were 5U.S.C. Section 2301(b)(9), 5 U.S.C. Section 2302(b)(8), 5U.S.C. Section 7701.(c)(2), 5 CFR 1201.56(b)(2), and Army Regulation 5-20. Names of key persons, with relationships and background of reprisals against Petitioner, were: Mr. Tommy Joe Mills, Lieutenant General Crosbie Saint, COL Clyde W. Glosson, COL Tommy A. Baucum, COL Thomas W. Templer, Mr. Robert R. Bikoski, Mr. James Hiltz, Mrs. Kathy MacIntyre, and Ms. Cheryl Remick.

By the time Petitioner submitted Hearing Exhibit "A" to Judge Malouf on 15 Sep 91; substantial whistleblowing evidence caused the Petitioner to state on page 35, Appendix A:

> "other retaliatory actions taken against Orlon R. Hill as reprisals for whistleblowing. It is the position of the appellant that the adverse personnel action (demotion) made the subject of this appeal is in fact the principal form of reprisal taken against Appellant for his past continuous acts of whistleblowing."

On 25 Sep 91 and just before commencement of hearing, Judge Malouf issued her Memorandum

of Conference and Rulings (Appendix A, page 51) that disapproved (the most senior individuals) Saint, Baucum, Hiltz, MacIntyre and most of the Petitioner's substantiating whistleblowing witnesses as discussed in documents dated 15 Sep 91 at Appendix A, pages 40-45 and 94-101. COL Baucum and Ms. MacIntyre's affair had been reported to IG by Petitioner only 6 weeks before being letter proposing his downgrade.

During the hearing on 25 Sep 91, hearing extracts at Appendix A, pg 104-105, Judge Malouf erroneously and repeatedly prohibited Petitioner's representative from questioning COL Templer about whistleblowing even though COL Templer was the RECOMMENDING OFFICIAL per 5 U.S.C. Sec 2302 (b) and Petitioner's 2nd level supervisor. Judge Malouf erroneously did not recognize lies by COL Templer during 25 Sep 91 hearing whereas at Appendix A, page 106-107, he gave a late date:

> "I was made aware that he had a handicap and needed some kind of considerations, I guess, in April (91) of this past year."

He lied about knowing Petitioner was handicapped and depressed (and operating in a diminished capacity) prior to subsequent events for which petitioner was charged. Yet COL Templer confessed an earlier date in the same MSPB hearing on 25 Sep 91, extract at Appendix A, page 108, stating:

> "In the July (90) time frame I know that Ms. Frances Mulkey, I guess Sherry Wrbas, Lorena Manning, all were concerned about whether or not Mr. Hill was on some type of medication or something, and maybe that he was off his medication, and that he had been acting differently with his employees."

On page 111, Appendix A, COL Templer also confessed:

> "He (Petitioner) told me that he was on some kind of drug, I guess, in the June or July time frame that he was trying to get off some kind of medicine, if I recall correctly. June or July of '90."

COL Templer therefore knew petitioner was taking medication for depression in May-Jun 90 prior to any supposedly reprisals were performed as charged by the Petitioner.

Judge Malouf erroneously and repeatedly demanded in Hearing extracts at Appendix A,

pg 112-117, that only COL Glosson, (Approving Official and Petitioner's 3rd level supervisor) could be questioned by Petitioner's representative about whistleblowing. She demanded:

> "The person who is responsible.... In order to establish the whistleblowing you must demonstrate that the deciding official, Glosson, knew of the protected disclosure, took action against the appellant, and did so based on the disclosure."

On page 112-114, Appendix A, Judge Malouf also directed:

> "...you have to identify.... The person whose determination is relevant is the deciding official."

Judge Malouf made a major error by denying questioning of COL Templer because he was PETITIONER'S RECOMMENDING OFFICIAL per 5 U.S.C. Sec 2302(b). On Page 116-117, Exhibit A, Judge Malouf again erred by stating:

> "I'm cutting off this testimony."
> "And I'm certainly not going to consider it."
> "He didn't make the decision."

COL Glosson confessed on 25 Sep 91 at the Hearing, Appx A, pg 20-23, that the

petitioner had informed him of being handicapped in early 1988 yet he lied in Appendix A, page 90-91 stating there was no record of Petitioner's handicap.

Judge Malouf at Appendix A, pages 118-127, directed Ms. Manning not to answer questions by Petitioner's representative about her first-hand knowledge about Petitioner's long term whistleblowing nor about senior officials engaged in whistleblowing reprisal against Petitioner as enumerated in Petitioner's Hearing Exhibit "A" dated 15 Sep 91. On pages 118 & 126, Judge Malouf directed:

> "Don't answer that. It's not relevant. Go to another question."
> "Concerning her underlying allegations, not the relation between her and anybody else."
> "And this witness has no personal knowledge of that, because she was not there at the time."

On page 124, Appendix A, Judge Malouf directed the Petitioner's representative as follows:

> "Tell me on the record, right now. Tell me what your allegations about whistleblowing are. And give me the dates."

Mr. Herrmann responded:

> "The whistleblowing dates are specified in Exhibit A,"

Judge Malouf stated on page 125 Appendix A:

> "I don't know.... what hostility you are talking about? Whose hostility?"

On pg 122-123, Appdix A, Ms. Manning testified:

> "A good deal of hostility. People resented Commercial Activities very much." "Well, I would say it went over a period of several years and it was more than one G-3 involved."

In the second case, MSPB DOCKET NO DA-1221-92-0394-W-1, Ms. Manning's affidavit dated 27 Jul 1992 at Appendix A, pages 128-131 was furnished to the full Merit Systems Protection Board on 30 July 92, (for a final decision) to support the fact that whistleblowing was not res Judicata in the second action because her own first-hand whistleblowing testimony was denied in the first action by Judge Malouf for MSPB DOCKET DA7529110549. In the affidavit, Ms. Manning stated:

> "I am making this statement because I was not given the opportunity to discuss these facts during an earlier hearing in Royce

Hill's (Petitioner) case. I was prepared to testify to the type of situations in which CA program management had to operate. I was surprised when the Judge instructed me not to answer questions concerning some of those situations."
"Managers and workers across the installation were deeply resentful of the program."
"Though all of us were targets of this resentment to varying degrees, Royce Hill received the brunt of it. He was single-minded, hard-charging, and very vocal about the program."
"There was also resentment on the part of top management in DRM because CA Program Management had been taken from them and placed in DCCA in 1983."
"Royce was put in a room where supplies were stored.."
"Royce was given no voice in the personnel assignments."
"Another staff activity harboring long-term resentment of the CA program managers, and Royce in particular, was G3/DPTM. This resentment began when we first became involved in applying CA laws and rules to workers in the G3 Range Division." (COL Baucum was Director of this activity)
"Any action in which CA management personnel were involved met with both overt and covert resistance from G3 and DRM managers."
"Several conversations with those persons concerned Royce's deteriorating physical and emotional condition."

Judge Malouf had denied Petitioner his right to present his witnesses and case per Halifan v. U.S., 1965. 354 F2.d, 358, 173.

Within minutes of completing the last day of hearing on 27 Sep 91 for MSPB DOCKET DA7529110549, on Appendix A, page 132, in response to a question about Commercial Activities Program (CA) from Agency's lawyer; Judge Malouf confessed:

> "I can't.... because I haven't read the exhibit, Mr Pobielski. I can't tell you...."

in reference to Appellant's EXHIBIT "A" DATED 15 SEP 91. Yet SHE HAD ALREADY DISAPPROVED WITNESSES AND TESTIMONY IN HER RECORD OF CONFERENCE AND RULING DATE 25 SEP 91 AND DESTROYED THE ABILITY OF PETITIONER TO PRESENT HIS WHISTLEBLOWING CASE.

Judge Malouf issued her initial decision for MSPB DOCKET DA7529110549 on 10 Oct 91 after hearings on 25 and 27 Sep 91. Her incomplete and unsubstantiated findings about the Petitioner's whistleblowing affirmative defense is extract at Appendix A, pages 134-144. Her erroneous conclusion on page 138 stated:

"The contracting disclosures related to

> contracts concerning the firing ranges. According to the appellant, in 1986, in the course of his employment in the agency, he found problems with certain contracts. He claimed that the problem he found and reported, as part of his j between 1986 and 1987, constituted protected disclosures. The record does not establish that the disclosures were protected disclosures, but assuming {arguendo} that those disclosures were protected, I find they were not a contributing factor to the instant action."
> "Accordingly, I find they are too remot in time to be a contributing factor to this action."

On page 139-140, Appendix A, Judge Malo concluded:

> "I find that under the instant circumstances, the appellant's disclosu (IG complaint about COL Baucum) was protected and constituted whistleblowing."

Judge Malouf had massively erred by concluding that long term whistleblowing disclosures by and reprisals against Petitio were not relative because: (1) She had not r Petitioner's Hearing Exhibit "A" (providing names, dates, places, instances, and referen for whistleblowing and reprisals) prior to hearings, (2) She had disapproved COL Baucum

and several other whistleblowing witnesses from appearing, (3) She had stopped whistleblowing testimony by witnesses (especially COL Templer and Ms. Manning) that she did allow to appear.

Judge Malouf acted contrary to the MSPB Board's decision in Clarance B. Gergick vs. General Services Administration, 25 Jul 1991, DOCKET No. SL122190W0030 that the Whistleblower's Law can be used retroactively if a continuous pattern is shown. Extracts of this reference state:

> "A Claim to redress a continuing wrong is deemed to have accrued on the date of the last wrongful act", (Petitioner's demotion).
> "(where a cause for injury is predicated on numerous acts occurring over an extended period, the action accrues with each act, at least until the injury becomes permanent."
> "In the case before the Board, like {Guardians association of New York and Home Insurance Co.}, involves a prohibited employment practice-reprisal-that allegedly continued from before the effective date of the applicable statute until after the statutes's effective date. In addition, we find that the Court's reasoning in the {Home Insurance CO.} is as applicable to the WPA (Whistleblowers Protection Act) as it was to the statute

at issue in this case. That is, a holding that the WPA provides no remedy for a series of retaliatory acts beginning efore its effective date would effectively insulate indefinitely conduct that began before that date, even when new instances of that conduct are initiate after WPA becomes effective. We do not believe this result was intended by Congress when it enacted the legislation"

Petitioner's representative started medical leave from the Texas Bar on 1 Oct 91 (only 4 days after hearing ended) which extended to 1 May 92. He had not performed up to par in representing the Petitioner and had informed Judge Malouf. During Oct 1990, Petitioner had attend 4 weeks of full time Psychiatric treatment with Dr. Paul Hill that had been his Doctor since 1985. At this time, the Petitioner was still recuperating from his major depression as testified by Dr. Hill in testimony extract at Appendix A, pages 145-154 as follows:

"He has very high standards for himself as well as for other people, which means in the real world, he's often very disappointed and upset because other people don't behave accordingly to his high standards."

"Well, yes. The way I would put that is, if it requires extra effort on his part to carry out ordinary activities, most of us wouldn't have to try so hard. Uh, he has been depressed as well. and so he has had less reserve, uh, anyone will - if there's enough stress will begin to dysfunction. But most of us have a fair amount of reserve. That is a very stressful kind of activity to do when you're constantly.... try to do things that the whole organization doesn't want you to do."

In Response to question from attorney about whether the hostile environment forced by his supervisors contributed to Petitioner's problems and necessitate treatment; Dr. Hill responded:

"There is much. We call that a dull bond. If there is no rational way out of that, it in fact, is one of the psychological theories of the causation of schizophrenia. It's an impossible circumstance."
"Uh, He... we... as I understand the time sequences, we did the treatment, the intensive treatment about the time all of this was going on. Right toward the end of it, but at the time it was going on."
"He remained on medicine through the time that he was slipping away, anyway."
"Well, anybody whose job it is to be an inspector and to find people at fault has a very tough row to hoe. Not everyone does that."

At that time, Petitioner did not realize he was still not mentally competent, because of

his major clinical depression, to present is own defense per Frommhagen v U.S., Ct. Cl. 1978, 573, F.2d 52. Although not competent at the time, Petitioner's 8 Nov 91 inadequate appeal was prepared and submitted by him to the Merit Systems Protection Board as required.

Petitioner received 2 letters from the Office of Special Counsel on 15 Jan 92 stating their investigation was completed and recommended that Petitioner should make an Individual Right of Action Appeal (second action) to MSPB DOCKET DA7529110549 about whistleblowing.

Immediately afterward, the MSPB issued the final decision (on first action) on 24 Jan 92 without first receiving and considering the two 15 Jan 92 OSC letters which violates the Merit Systems Protection Board precedent re Kenneth E. Knollenburg v. Merit Systems Protection Board, 9103226, Jan 14, 1992. This reference required that whistleblowing defenses must first be presented to OSC for investigation

before MSPB could decide a case.

The Right of Action Appeal (second action) recommended to petitioner by OSC on 15 Jan 92 was submitted in good faith to the Washington Merit Systems Protection Board on 6 Mar 92. On 18 May 92, at the request of the Agency, Judge Carnes, from Dallas Regional MSPB) issued a show cause to Petitioner on why appeal should not be dismissed due to res Judicata.

Petitioner's 22 May 92 response (provided to Appeals Court) to Judge Carnes' show cause provided minute facts and code citations (the same facts as contained herein) supporting Petitioner's contention that Judge Malouf had made numerous and massive errors which abruptly stopped Petitioner presenting his whistleblowing affirmative defense that resulted in a totally erroneous initial decision by her. JUDGE CARNES STILL RULED res Judicata WITH LITTLE DISCUSSION except for repeats of Judge Malouf's erroneous conclusions.

On 12 Nov 92, the Petition for Review for MSPB DOCKET NO DA-1221-92-0394-W-1, Appendix A, pages 77-91, was forwarded by Petitioner to the Federal Circuit of Appeals for Federal Circuit. All of the above documented salient proofs were enumerated in detail with copies of all document discussed herein **INCLUDING 2 VOLUMES OF THE TOTAL HEARING TESTIMONY FOR MSPB DOCKET DA7529110549. THE PETITIONER HAS** NOT YET HAD HIS CONSTITUTIONAL RIGHT TO PRESENT HIS WHISTLEBLOWING DEFENSE THEREFORE MSPB DOCKET NO DA-1221-92-0394-W-1 SHOULD NOT BE AFFIRMED AS *res Judicata*. There is no indication in the initial decision for the second action by Judge Carnes, the final decision by the Merit Systems Protection Board, and the Federal Court of Appeals had sufficiently studied or considered the proof provided by the Petitioner that Judge Malouf had made major whistleblowing errors in the first action MSPB DOCKET DA7529110549 which deprived Petitioner of his rights to adequately present whistleblowing evidence.

On 19 Apr 93, The Federal Circuit Court of Appeals for the Federal Sector issued the decision for the second action DOCKET NO DA-1221-92-0394-W-1 at Appendix A, pages 1-9, affirming dismissal on the basis of res Judicata. Petitioner contends that based on the above facts, the Federal Circuit Court of Appeals cannot correctly conclude on page 5 of the decision that:

> "However, the decision in the first action is not an issue here."

CONCLUSION

Based on examples herein, Petitioner contends that Judge Malouf did not comply with her authority and responsibility as judge as required by 5 CFR 1201.41 (b)(5)(ii)&(iii) and (10) since she did not review documents to her and properly preside over the hearing. Judge Malouf's errors precluded Petitioner from providing evidence for whistleblowing and other affirmative defenses as required by 5 CFR 1201.56 (b) and 5 CFR 1201.61.

For the reasons set forth above, a writ of certiorari should issue to review the judgement and opinion of the Court of appeals in this matter. Petitioner has been unjustly doomed from the onset of his appeals due to the massive MSPB errors described.

As a minimum, Petitioner requests that the Supreme Court of the United States overturn the ruling of the Federal Circuit Court of Appeals for the Federal Sector by ordering MSPB to accept Petitioner's Individual Right of Action appeal, MSPB DOCKET NO DA-1221-92-0394-W-1, and then legitimately hear Petitioner's whistleblowing appeal.

Due to the massive errors by Judge Malouf in the initial action MSPB DOCKET DA7529110549 and the interrelationship of multiple affirmative defenses, the most optimum and just decision by the Supreme Court of the United States is to order a complete reversal of all previous decisions and make Petitioner whole. If the Court does not reverse; then the Court

should order the MSPB to start over on all affirmative defenses by the Petitioner starting with the initial appeal on 10 Jun 1991 for MSPB DOCKET DA7529110549.

Respectfully submitted,

Orlon R. Hill dated 23 Jul 93

Orlon R. Hill
108 W. Briarwood Lane
Harker Heights, TX 76543
Home, 817-699-2659
work, 817-287-3956